82-1590

NO.

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IN THE

Supreme Court of the United States

October Term, 1982

S. DELACY STITH,

Petitioner,

v.

VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where his alleged misbehavior as defense counsel did not delay the felony trial then in progress or otherwise obstruct or interrupt the administration of justice, was the petitioner entitled under the Due Process Clause of the Fourteenth Amendment to notice, to assistance of counsel, and to a trial of the resulting charge of contempt before an impartial tribunal?

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No.

S. DELACY STITH,

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v.

VIRGINIA

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

S. Delacy Stith petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia refusing appeal from a summary conviction of and sentence for contempt entered by the Circuit Court of the City of Portsmouth, in the State of Virginia.

OPINIONS BELOW

Neither of the courts below delivered an opinion. The orders of the courts below are set forth in the Appendix.

JURISDICTION

The petitioner was summarily adjudged in contempt and sentenced to ten days in jail by order of the Circuit Court of the City of Portsmouth entered on August 20, 1982 (Appendix 4a). The Supreme Court of Virginia refused review by order entered on January 26, 1983. (Appendix 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

THE CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant provisions of the Fourteenth Amendment to the Constitution of the United States and, in its entirety, Section 18.2-456 of the Code of Virginia,

1950, are set forth in the Appendix at page 5a.

STATEMENT OF THE CASE

The order of the trial court (Appendix 4a) infers that on August 20, 1982, the petitioner, "S. DeLacy Stith was summarily found guilty of . . . misbehavior in the presence of the Court in violation of Section 18.2-456 paragraph (1) of the Code of Virginia." The order holds that the petitioner "intentionally [tried] to usurp the power and dignity of [the] court and * * * tended to obstruct and interrupt the administration of justice." For contempt of court, petitioner was sentenced to ten days in jail.

The Facts

The events which gave rise to the adjudication of contempt occurred on

August 20, 1982 during a jury trial in the Circuit Court of the City of Portsmouth when the petitioner, as attorney for the defendant, was examining his client who was under indictment for malicious wounding and using a firearm in the commission of a felony. They are reported in the transcript, viz:

Q. Now, Miss Stackhouse, with reference to the events in question, did you shoot Herbert Holman?

A. No, I didn't.

Q. Did you give a statement to the police when you were --

MS. RINGER: Objection.

THE COURT: I sustain the objection. Mr. Stith --

MR. STITH: You don't have to holler. I can listen, Judge. Everybody is hollering at me. I'm not a dog.

THE COURT: Mr. Stith, you try the patience of the Court sometimes because you do things, because you know from before in this court that is not admissible. You can't ask her for self-serving statements. You know that.

MR. STITH: Judge, you don't know what the statement is.

THE COURT: I don't care what it is, Mr. Stith, and I will raise my voice if I want to.

MR. STITH: No questions. I have no questions to ask the witness at all, none, absolutely not.

THE COURT: All right. Step down. Mr. Stith, I will deal with you as soon as court is over.

MR. STITH: Judge, I don't really care any more. You have been dealing with me all day.

THE COURT: Mr. Stith, you will get ten days in jail for contempt of court. (Tr. 175-6)

At a later time, when the court and counsel had retired to the Conference Room to consider the jury instructions, the trial judge explained his actions, viz:

THE COURT: I want to add into the record I find it highly contemptible on the part of counsel to blurt out to the jury he's not a dog, inferring the Court is treating him as a dog. It's highly contemptuous, this Court will not tolerate it and the actions of this Court will stand. (Tr. 178-9)

HOW AND WHEN THE FEDERAL QUESTION WAS RAISED

In his petition for appeal, addressed to the Supreme Court of Virginia,

petitioner made two assignments of error, viz:

I

> The court erred in summarily holding the petitioner in contempt for his spontaneous, short, verbal reaction to the loudness with which an objection interrupting his question was made and, in turn, sustained.

II

> The court violated the due process requirements of the Fourteenth Amendment to the Constitution.

This Court's decisions herein cited were cited in argument of those assignments; and the decision of the Virginia court herein cited was discussed by the petitioner in his Reply Brief.

The Supreme Court of Virginia considered the arguments submitted and, by its order of 26 January 1983 (Appendix 1a), held that there is no reversible error in the judgment complained of and, accordingly, refused the petition for appeal.

REASONS FOR ALLOWANCE OF THE WRIT

The Virginia court denied to the instant petitioner the procedural due process to which, in Higginbotham v. Commonwealth, 206 Va. 291, 142 S.E.2d 746 (1965), another attorney was held to be entitled, viz:

> "[E]ven though the alleged misbehavior and disobedience of the court's ruling by the defendant was committed in the presence of the court, the judge should have had a rule specifying the alleged contemptuous acts served on the defendant, to be followed by a full hearing in the matter, instead of exercising his discretionary summary power under Code § 18.1-292" (206 Va. at 296).

In denying to this petitioner the "full hearing" which it accorded in Higginbotham, supra, the court below disregarded Taylor v. Hayes, 418 U.S. 488 (1974), where a summary proceeding after trial to punish the petitioner for alleged contempt committed during the trial, without provision of opportunity to be heard in defense or mitigation before he was finally adjudged guilty and sentence was imposed, was held not to square with the Due Process Clause of the Fourteenth Amendment. As in Taylor (see syllabus 3), so here: "Because it appears from the record that 'marked personal feelings were present on both sides' and that marks of 'unseemly conduct [had] left personal stings', another judge should have been substituted . . . for the purpose of finally disposing of the

the contempt charges." Again as in Taylor, at footnote 6, so here: "Punishment without issue or trial [is] so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court [is] required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it."

An impartial judge might well have considered the instant case in the light of this Court's admonition repeated In The Matter of Larry Little, 404 U.S. 533, 555 (1972), viz:

> "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The damage must not be remote or even probable; it must immediately imperil . . ..

> [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate."

C O N C L U S I O N

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Samuel W. Tucker
Of Counsel for Petitioner

March 1983.

A P P E N D I X

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 26th day of January, 1983.

S. DeLacy Stith Appellant,

against Record No. 822078
Circuit Court No. CD-M82-0653

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Portsmouth

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgment complained of. Accordingly, the court refuses the petition for appeal. Code § 8.01-675.

A Copy,

Teste:

Allen L. Lucy, Clerk

* * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 18th day of March, 1983.

S. DeLacy Stith, Appellant,

against Record No. 822078
Circuit Court No. CD-M82-0653

Commonwealth of Virginia, Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgment rendered herein on January 26, 1983, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a

petition for a writ of certiorari to review the judgment of this court, it is ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on January 26, 1983, be, and the same is hereby, stayed, to and including the 26th day of April, 1983, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,
Teste:
Allen L. Lucy
Clerk

* * * * *

[Order of Conviction]

THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH
ON FRIDAY THE 20TH DAY OF AUGUST
IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-TWO

PRESENT: HONORABLE LESTER E. SCHLITZ,
CHIEF JUDGE

IN THE MATTER OF CONTEMPT OF COURT
OF S. DELACY STITH

This day S. Delacy Stith was summarily found guilty of criminal contempt of this Court in intentionally trying to usurp the power and the dignity of this Court, and by misbehavior in the presence of the Court tended to obstruct and interrupt the administration of justice in violation of Section 18.2-456 paragraph (1) of the Code of Virginia, and for such contempt of Court he is hereby sentenced to a period of ten (10) days in the jail of this city.

And the said S. Delacy Stith is

committed to jail.

* * * * * * * * *

Constitution of the United States

Amendment XIV

> " * * * [N]or shall any State deprive any person of life, liberty, or property without due process of law; * * *."

* * * * * * *

Section 18.2-456 of the Code of Virginia, 1950 [formerly Section 18.1-292]:

> "§ 18.2-456. Cases in which courts and judges may punish summarily for contempt.—The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:
>
> "(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;
>
> "(2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;
>
> "(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or

like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

"(4) Misbehavior of an officer of the court in his official character;

"(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court."

* * * * * * *